**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MICHAEL G. PHILLIPS**<br>Claimant<br>VS.<br><br>**WILLIE BLACKBURN d/b/a**<br>**B & W CONTRACTORS**<br>Respondent<br>AND<br><br>**AMERICAN FAMILY MUTUAL**<br>**INSURANCE COMPANY**<br>Insurance Carrier | ) | Docket No. 206,009 |

## ORDER

Respondent appeals from a May 3, 1996 preliminary hearing Order of Administrative Law Judge Alvin E. Witwer which granted claimant's request for temporary total disability compensation and medical benefits.

## ISSUES

On appeal, respondent contends the Administrative Law Judge exceeded his jurisdiction in awarding benefits because the evidence fails to establish that claimant was an employee of respondent on the accident date. In the alternative, respondent contends that if an employee/employer relationship existed, respondent nevertheless does not fall within the jurisdiction of the workers compensation act due to his annual payroll being less than $20,000 per year.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds that the Administrative Law Judge's orders should be affirmed.

Claimant was injured on September 1, 1995 when he fell from the roof of a house. Claimant was employed as a roofer for respondent and was working in that capacity when he was injured. The record discloses that claimant and Willie Blackburn, owner of B & W

Contractors, had discussed changing the nature of their working relationship whereby claimant would no longer be an employee but instead would become an independent contractor and subcontract work with respondent. However, the greater weight of the evidence establishes that this change in their working relationship had not been accomplished by the time of claimant's accident. For the reasons more fully set forth in the Order of the Administrative Law Judge, the Appeals Board finds claimant was an employee of respondent on the accident date.

Mr. Blackburn testified that he did not have a $20,000 payroll in 1994 and by the date of claimant's accident he did not contemplate having a $20,000 payroll in 1995 as well. In fact, at the April 29, 1996 preliminary hearing, Mr. Blackburn testified that the payroll of B & W Contractors did not exceed $20,000 for the year 1995, excluding himself and family members. Likewise, he did not expect that to change for 1996. Accordingly, respondent contends that it is not subject to the Kansas Workers Compensation Act. K.S.A. 44-505(a) provides:

> "[T]he workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to: . . .
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> "(2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection . . . ."
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> However, subsection (b) of the same statute provides that:
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> "(b) Each employer who employs employees in employments which are excepted from the provisions of the workers compensation act as provided in subsection (a) of this section, shall be entitled to come within the provision of such act by . . . filing with the director a written statement of election to accept thereunder."

The record before us does not disclose whether or not the employer had filed an election with the director to come under the jurisdiction of the Workers Compensation Act. The record does disclose, however, that the respondent had in effect at the time of claimant's accident a valid and current policy of workers compensation insurance coverage. The Appeals Board finds the existence of workers compensation insurance coverage to be persuasive evidence as to the intent of the employer to be under the Act. *See* Stonecipher v. Winn-Rau Corporation, 218 Kan. 617, 545 P.2d 317 (1976).

In addition, respondent admitted that the terms of his contract for the job on which claimant was injured required respondent to have workers compensation coverage on his employees. According to claimant, respondent told him this and that he was covered under a policy of workers compensation insurance. Following our holding in Schneider v. Hensleigh, Docket No. 170,986 (February 18, 1994), this is also evidence of an employer's intent to come under the Workers Compensation Act. *See* K.S.A. 44-542a.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the May 3, 1996 Order of Administrative Law Judge Alvin E. Witwer should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of July 1996.

BOARD MEMBER

c: George E. Mallon, Kansas City, KS
Joseph R. Ebbert, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director